

2014 WL 9911009 (Ariz.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Arizona.
Pima County

Ronald A. BERNSTEIN, M.D., Plaintiff,

v.

3 GORILLAS MOVING and Storage, LLC, an Arizona limited liability company; Art Back
and Jane Doe Back, husband and wife; and Troy R. Emerson, a single man, Defendants.

No. C 2013 4264.
July 9, 2014.

Motion for Partial Summary Judgment on Count Two - Elder Abuse

Robert W. Fischer, III, SB #027424 PCC #66340, rfischer@wechv.com, Law Offices Waterfall Economidis Caldwell, Hanshaw & Villamana, P.C., Williams Center, Eighth Floor, 5210 E. Williams Circle, Tucson, Arizona 85711, (520) 790-5828, for defendants 3 Gorillas Moving & Storage, LLC and Troy Emerson.

Judge Fields.

Defendants 3 Gorillas Moving and Storage, LLC (“3 Gorillas”) and Troy Emerson (“Emerson”) (collectively “Defendants”), by and through undersigned counsel, hereby submit this Motion for Partial Summary Judgment on Count II - Elder Abuse. There is no factual or legal basis for Count II and Defendants are, therefore, entitled to summary judgment. This Motion is more fully supported by Defendants' Separate Statement of Facts in Support of Motion for Partial Summary Judgment (hereinafter “DSOF ¶ _____”), incorporated herein by this reference and the following Memorandum of Points and Authorities,

MEMORANDUM OF POINTS AND AUTHORITIES

I. Factual Background

The relevant, material facts for consideration of this Motion for Partial Summary Judgment are simple, straightforward, and undisputed. Defendant 3 Gorillas provides moving and storage services. (DSOF ¶ 1) Defendant Emerson is the owner and sole member of 3 Gorillas. (DSOF ¶ 2) Plaintiff Ronald Bernstein, M.D. (“Plaintiff” or “Bernstein”) hired 3 Gorillas to package and move his property. (DSOF ¶ 3) Defendants 3 Gorillas and Emerson did not provide care or assume any legal duty to provide care to Bernstein. (DSOF ¶ 4) Defendants 3 Gorillas and Emerson were not appointed by any court to provide care to Bernstein. (DSOF ¶ 5)

II. Law and Argument

Plaintiff's Complaint alleges in Count II - Elder Abuse a claim against Defendants. Pursuant to A.R.S. § 46-455, Plaintiff suggests this Court has the statutory authority to “prevent, restrain and remedy the conduct of the Defendants, to issue such injunctions as are necessary to prevent and cure the exploitation, and to award damages, including punitive damages, in response to acts of exploitation such as those of the Defendants against the Plaintiff.” (Complaint ¶ 41)

However, A.R.S. § 46-455 does not authorize a civil action against Defendants based on the actual facts of this case. A.R.S. § 46-455(B) clearly states, “A vulnerable adult whose life or health is being or has been endangered or injured by neglect, abuse

or exploitation may file an action in superior court *against any person or enterprise that has been employed to provide care, that has assumed a legal duty to provide care or that has been appointed by a court to provide care to such vulnerable adult for having caused or permitted such conduct.*” (emphasis added) Defendants were never in a position to provide care to Plaintiff as contemplated and required under the statute. Instead, they merely packaged and moved furniture. Simply, there is no stated cause of action against Defendants for **elder abuse** under A.R.S. § 46-455. Rather, such a cause of action clearly requires a defendant provide care or be placed in an obligation to provide care to a plaintiff to give rise to a civil action for “eider **abuse**.”

As discussed and defined by the Arizona Supreme Court, “ ‘Care’ is ordinarily understood to mean ‘CHARGE, SUPERVISION, MANAGEMENT: responsibility for or attention to safety and well-being.’ *In re Estate of Wyatt* -- P.3d ---*2, 2014 WL 2926037 (2014) (quoting *Webster's New Int'l Dictionary* 338 (3d ed.1976); see also *State v. Jones*, 188 Ariz, 388, 392, 937 P.2d 310, 314 (1997). “ ‘Care’ is defined in Webster's Third New International Dictionary as ‘charge, supervision, management: responsibility for or attention to safety and well-being.’ The example given is ‘under a doctor's care.’ ” (emphasis added) The interpretation of care for purposes of A.R.S. § 46-455 is medical and well-being care, certainly not moving and packaging services. There is no reasonable argument that A.R.S. § 46-455 can be applied to the facts of this case. Defendants are therefore, entitled to partial summary judgment on Count II - Eider **Abuse**.

III. Defendants Request for Attorneys' Fees

It is not customary to award attorneys' fees and costs to the prevailing party on a motion for partial summary judgment. However, in this action, Plaintiff plead a groundless claim in a verified complaint. Counsel for Defendants wrote to counsel for Plaintiff and presented sufficient information to put Plaintiff on notice that there was no factual and legal basis to support Count II. Counsel for Defendants respectfully requested that Plaintiff dismiss Count II - **Elder Abuse** and later followed up on that request. Plaintiff was given ample time to dismiss the claim and yet, failed to do so. As a result, an award of attorneys' fees and costs to Defendants pursuant to A.R.S. § 12-349 is appropriate.

On March 7, 2014, undersigned Counsel wrote to counsel for Plaintiffs and requested that Plaintiff dismiss Count II - **Elder Abuse** of the Complaint for the reasons articulated in this Motion for Partial Summary Judgment. The correspondence sent to counsel for Plaintiff is attached to this Motion as Exhibit A. Plaintiff failed to dismiss Count II. On June 16, 2014, undersigned ; counsel emailed counsel for Plaintiffs again and requested that Plaintiff dismiss Count II - **Elder Abuse** of the Complaint. Plaintiff again failed to dismiss Count II. As a result, Defendants have been forced to file this Motion for Partial Summary Judgment and incur expenses including attorneys' fees.

A.R.S. § 12-349(A) “Unjustified actions” grants this Court the authority to award attorneys' fees and expenses, “[I]f the attorney or party does any of the following: 1. Brings or defends a claim without substantial justification,” Count II of the Plaintiff's Complaint was brought without justification. There is and was no right under A.R.S. § 46-455 to bring a civil action for “**elder abuse**” against Defendants.

A.R.S. § 12-349(F) further explains that in regards to unjustified actions, “ ‘without substantial justification’ means that the claim or defense is groundless and is not made in good faith.” Count II of the Complaint is and was most definitely groundless and not made in good faith. There is no possible justification for Count II. In fact, Plaintiff cited to the language of § 46-455 in Count II of the Complaint, but ignored the clearly stated and obvious requirements for an action against specific defendants in specific positions. As such, it is obvious that Plaintiff reviewed the Statute and its language before filing this claim against Defendants. As a result, there is no possible justification for the filing of this claim against Defendants given the clear language of § 46-455 barring any claim against Defendants in this matter. Moreover, Plaintiff verified the Complaint in this action, attesting to his review of the Complaint and affirmation of the truth contained therein. There is no possible justification for the groundless Count II filed by Plaintiff. However, Plaintiff chose to file this claim against Defendants to vilify and defame Defendants.

Undersigned Counsel presented Counsel for Plaintiff with the information necessary to appropriately dismiss Count II and requested that Plaintiff dismiss Count II. Plaintiff did nothing and maintained Count II as part of this action. As noted in [A.R.S. § 12-349\(C\)](#), a plaintiff can only dismiss a claim within a “reasonable time after the attorney or party filing the dismissal knew or reasonably should have known that the claim or defense was without substantial justification.” As noted, on March 7, 2014, undersigned counsel wrote to counsel for Plaintiffs and requested that Plaintiff dismiss Count II - **Elder Abuse** of the Complaint for the reasons articulated in this Motion for Partial Summary Judgment. Plaintiff had reasonable time to dismiss Count II and failed to do so. Any dismissal of Count II at this point is beyond the reasonable timeframe required under [A.R.S. § 12-349\(C\)](#). Plaintiff cannot escape an award of attorneys' fees for dismissing Count II after receipt of this Motion for Partial Summary Judgment.

Defendants request an award of attorneys' fees and expenses incurred as a result of being forced to file this Motion for Partial Summary Judgment given the sufficient efforts taken to demonstrate to counsel for Plaintiff and Plaintiff that Count II was groundless, meritless and should be dismissed.

IV. Conclusion

Defendants request that this Court enter partial summary judgment in favor of Defendants on Count II - **Elder Abuse** of the Complaint. There is no factual or legal basis for Count II and Defendants are entitled to summary judgment. Defendants further request this Court enter an order awarding Defendants their reasonable attorneys' fees and expenses incurred as a result of being forced to file this Motion.

DATED this *9th* day of July, 2014.

WATERFALL ECONOMIDIS CALDWELL HANSHAW & VILLAMANA, P.C.

By <<signature>>

Robert W. Fischer, III

Attorneys for Plaintiff

COPY of the foregoing hand delivered this *9th* day of July, 2014, to:

Hon. Richard S. Fields

Pima County Superior Court

110 West Congress Street

Tucson, Arizona 85701

COPY of the foregoing mailed this *9th* day of July, 2014, to:

Jeffrey H. Greenberg

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Attorneys for Plaintiff

By: <<signature>>

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